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RESPONDENT'S BRIEF

IN THE

Supreme Court of the United States

October Term, 1951

No. 22

EVELYN G. GARDNER,

Petitioner,

vs.

PANAMA RAILROAD COMPANY,

Respondent.

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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On writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

History of the Case

This case is before the Court on writ of certiorari granted May 21, 1951, to review the decision of the United States Court of Appeals for the Fifth Circuit in appeal No. 13,259, in admiralty, 185 Fed. 2d 730 (C. A. 5th C. 1950) [R. p. 33], which affirmed the judgment of the United States District Court for the Canal Zone [R. p. 23] dismissing the libel on the ground of laches.

The Respondent, Panama Canal Company (formerly Panama Railroad Company) is a corporate agency and instrumentality of the United States, existing for the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone, with capacity to sue and be sued, and with principal offices in New York,

N. Y. and in the Canal Zone. Panama Canal Company Act, consisting of sections 245 through 258 of title 2 of the Canal Zone Code (48 U.S.C. secs. 1361–1361*l*) enacted by Act June 29, 1948, ch. 706, 62 Stat. 1076, and amended by Act Sept. 26, 1950, ch. 1049, secs. 5 et seq., 64 Stat. 1041. (See also Executive Order 10,263, June 29, 1951, 16 F.R. 6333, concerning the effective date of the Act of September 26, 1950.)

Prior to the Panama Canal Company Act, the Respondent corporation was organized under the laws of the State of New York; all of its stock was owned by the United States Government; and it at all times acted, in accordance with its primary function so to act, as an instrumentality or agency of the United States. Among its other activities, Respondent operates the Panama Line, a freight-passenger steamship line of three vessels between New York, N. Y. and Cristobal, C. Z. The line is operated primarily to provide freight service for the Canal Zone Government, the Panama Canal Company, and the Armed Forces and other Government agencies located in the Canal Zone, and to provide a regular passenger service for the employees of such Government agencies and organizations to and from the Isthmus.

On December 3, 1947, while voyaging from New York to Cristobal as an authorized passenger aboard the S. S. *Panama*, one of the three vessels operated by the Respondent, the Petitioner sustained a fall in the bathroom of her stateroom and suffered certain alleged injuries which are the basis for this suit and which were also the basis for each of two earlier actions at law, one against this Respondent as Defendant, and the other against the United States as Defendant under the Federal Tort Claims Act, both of which actions were dismissed before going to trial on the merits. As is developed in Petitioner's brief (p. 3) Petitioner's action

at law against this Respondent as Defendant was dismissed on October 7, 1948, the District Court sustaining the defense that the Court was without jurisdiction over the subject matter of the suit because of the applicability of the Federal Tort Claims Act to tort claims against the Defendant, the Panama Canal Company. An appeal from this judgment was taken but later dismissed by agreement of counsel for the parties. Petitioner's subsequent action against the United States under the Federal Tort Claims Act, as developed in Petitioner's brief (p. 5), was also dismissed for want of jurisdiction by judgment dated October 14, 1949 [R. p. 29] before trial on the merits. Congress having enacted Public Law 172, 81st Congress, approved July 16, 1949, ch. 340, 63 Stat. 444, which by specific amendment to section 2680 of title 28, United States Code, amended the Tort Claims Act by adding to the list of exclusions from the scope of that Act "(m) Any claim arising from the activities of the Panama Railroad Company."

Following these two dismissals, Petitioner on October 19, 1949, filed the present libel in admiralty against this Respondent [R. p. 1]. On November 23, 1949, Respondent filed a "Plea to the Jurisdiction of the Subject Matter," which plea challenged the District Court's jurisdiction over the subject matter on the ground, briefly, that no substantive cause of action had ever arisen against this Respondent as a result of the injuries alleged, since at the time of such injuries the only right which could possibly have accrued to the Petitioner was a right against the United States, as such entity, under the Federal Tort Claims Act. That plea to the jurisdiction was overruled by order of the District Court filed February 15, 1950 [R. p. 14]. Following the failure of the District Court to dismiss the case for lack of jurisdiction over the subject matter, Re-

spondent on February 27, 1950, filed its answer [R. p. 15], in which the defense of laches was asserted. After the issue of laches was tried separately pursuant to stipulation by the parties dated March 13, 1950 [R. p. 18], the District Court sustained the defense of laches and accordingly entered judgment on April 6, 1950, dismissing the libel [R. p. 23].

On Petitioner's appeal to the Court of Appeals for the Fifth Circuit, the Appellate Court affirmed the judgment of the District Court dismissing the case on the ground of laches [R. p. 31 (Opinion); R. p. 33 (Judgment)], and found it unnecessary to pass upon the question of jurisdiction over the subject matter.

Petition for writ of certiorari was filed by the Libelant on March 27, 1951, and granted May 21, 1951.

Questions Involved

The issues raised in the case are two:

(1) Did the District Court have jurisdiction over the subject matter of the suit [the District Court ruled that it did, and the Court of Appeals found it unnecessary to rule on that question in view of its ruling on the question of laches; Respondent contends that the District Court's ruling on this point was erroneous as a matter of law and urges lack of jurisdiction over the subject matter as an additional ground for sustaining the dismissal of the suit]; and

(2) Was the Court of Appeals clearly in error in ruling that the District Court did not abuse its discretion in dismissing the case on the ground of laches?

ALLEGATIONS OF ERROR

Respondent assigns as error the order of the District Court dated February 15, 1950 [R. p. 14], overruling Respondent's motion to dismiss the suit for lack of jurisdiction over the subject matter, on the ground that the Court's order was erroneous as a matter of law.

[On this review Respondent relies for an affirmance of the Court of Appeal's judgment of December 14, 1950, R. p. 33, affirming the District Court's judgment of April 6, 1950, R. p. 23, dismissing the libel, not only upon the ground stated in said judgments, to wit, that the suit is barred by laches, but also on the ground that the District Court was without jurisdiction over the subject matter of the suit.]

ARGUMENT

First issue: Did the District Court have jurisdiction over the subject matter?

Summary: In maintaining that the District Court lacked jurisdiction over the subject matter, Respondent takes the position that no cause of action, at law or in admiralty, ever arose against the Respondent, Panama Canal Company, on the basis of Petitioner's alleged injuries on or about December 3, 1947, because:

(a) at that time any cause of action arising therefrom either at law or in admiralty necessarily arose exclusively against the United States, as such entity, under the Tort Claims Act; and

(b) Public Law 172, 81st Congress, approved July 16, 1949, ch. 340, 63 Stat. 444, excluding the Panama Canal Company from the Tort Claims Act, has prospective effect only and does not retroactively create any cause of action against the Respondent and, of course, could not "revive" a cause of action that had never arisen.

a. Non-existence of any cause of action against Respondent

The first question presented is that of the jurisdiction of the District Court over the subject matter, which Respondent has contested both in the District Court and in the Court of Appeals. It is settled law

that on certiorari to a Court of Appeals, it is the duty of the Supreme Court to inquire into the jurisdiction over the subject matter of the courts below, even in cases where no question in respect thereof has been raised by the parties. *Shanferoke Coal and Supply Corp. vs. Westchester Service Corp.*, 293 U. S. 449, 451, 452, 55 S. Ct. 313, 79 L. Ed. 583; *Great Southern Fire Proof Hotel Co. vs. Jones*, 177 U. S. 449, 453, 20 S. Ct. 690, 691, 692, 44 L. Ed. 842. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review. *Mitchell vs. Maurer*, 293 U. S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338. Lack of jurisdiction of the subject matter may be considered and appropriate judgment given, at any stage of the proceedings either in the Supreme Court or below. *Matson Nav. Co. v. United States*, 284 U. S. 352, 52 S. Ct. 162, 76 L. Ed. 336.

Respondent contends on the question of the District Court's jurisdiction, that no cause of action arose against it from the injuries alleged in the libel herein, since, at the time of the injuries complained of (December 3, 1947), Respondent was not suable in tort, because the Federal Tort Claims Act (now reenacted principally as sections 2671–2680, and section 1346 (b) of Title 28, U. S. Code) provided the exclusive judicial remedy for personal injuries caused by the negligence or wrongful act or omission of any officer or employee of the Panama Canal Company. Had such alleged injuries been sustained prior to August 2, 1946, the date of approval of the Tort Claims Act, suit thereon could have been maintained against Respondent because of its general power to sue and be sued in its corporate name [see section 248 (d) of title 2 of the Canal Zone Code as added by the Panama Canal Company Act, June 29, 1948, ch. 706, 62 Stat. 1075, 48 U. S. Code 1361d (d)—which Act was amended, as aforesaid, by

Act Sept. 26, 1950, ch. 1049, secs. 5 et seq., 64 Stat. 1041—for Respondent's present power to sue and be sued]. After August 2, 1946, such suit could only be brought against the United States, as such entity, because the Tort Claims Act was made the exclusive remedy for such tort causes of action, and the suability of Respondent in tort was thus withdrawn by Act of Congress (28 U. S. Code 2679). In Respondent's view that withdrawal meant that for such tort no substantive cause of action could arise against the Respondent since, where the waiver, or withdrawal of a waiver, of sovereign immunity is involved [as it is here, the Respondent being an agency and instrumentality of the United States and therefore partaking of its sovereign immunity], it is not realistic to contend that a substantive right of action arises or can exist against a person who is immune from suit and against whom no judicial remedy can be pursued, since a substantive right for which the law affords no means of vindication or redress would be an illusory concept, useless and worthless. It follows that no substantive right could have arisen against the Panama Canal Company, Respondent, at the time of the alleged injuries, since there existed no judicial remedy which could have been pursued against Respondent. Respondent's position on this issue, on which the question of jurisdiction turns, was very concisely and forcefully expressed by the Court in *Commissioners of the State Ins. Fund v. United States*, 72 F. Supp. 549. The Court there had expressly presented to it the question of whether a cause of action against the United States under the Federal Tort Claims Act arose on July 28, 1945, the date of the injuries, or on August 2, 1946, the date on which the enactment of the Tort Claims Act made the United States liable (retroactively to January 1, 1945) for the first time for the type of injuries there involved. The

issue had to be squarely decided, for depending upon the determination of that point, plaintiffs' right to sue would or would not have passed to a third party under applicable New York statutes, the express terms of which are not here pertinent. In holding that the right of action accrued *on August 2, 1946, when the United States for the first time became suable*, rather than upon the earlier date of the injuries, Associate Justice Holtzoff, sitting by designation, stated at p. 554:

> "To analyze further the argument of the Commissioners their contention would seem to be that a substantive right of action against the United States existed although it was unenforceable because of the sovereign immunity. The books are replete with discussions of the difference between the concept of a cause of action and the remedy by which it can be enforced. In the light of the voluminous literature on this subject, any extensive consideration of this somewhat theoretical topic would be hardly appropriate. *Suffice it to say that to contend that a substantive right of action exists against a person who is immune from suit and against whom no judicial remedy can be pursued, is not realistic.* A substantive right for which the law affords no means of vindication or redress would be useless and worthless. Such a nebulous right would be but a phantom. *In my opinion the immunity of the United States from suit necessarily implies that no substantive right of action existed against it, and not that there was merely a procedural impediment against its enforcement.*" [Emphasis added.]

Petitioner does not deny that [as the District Court held in the earlier action at law brought against this Respondent as Defendant on the same facts, Civil No. 2807, R. p. 28], at the time of the alleged injuries, suit under the Tort Claims Act against the United States *as such entity* was the only judicial proceeding which could be brought on the basis of the alleged injuries.

Petitioner does not deny, therefore, that said earlier civil action brought against this Respondent as Defendant was properly dismissed. Nor does Petitioner at any point make any claim that this suit, having been brought in Admiralty rather than at law, is any more maintainable than an action at law would have been, except as it enables the Petitioner to avoid the automatic application of the one-year statute of limitations which applies to this class of suits in an action at law. Petitioner appears to contend, however, that at the time of the alleged injuries there arose in favor of Petitioner and against the Respondent, Panama Canal Company, a substantive right, notwithstanding Congress had, by enactment of the Tort Claims Act, declared that the Panama Canal Company was thenceforward not to be suable for such torts. It is this alleged substantive right which Petitioner now purports to be suing on—a right, Petitioner urges, which a subsequent chain of circumstances and events (principally, the amendment of the Tort Claims Act made by Public Law 172, 81st Congress, approved July 16, 1949, so as to exclude from its purview any "claim arising from the activities of the Panama Railroad Company") have now transformed into a more tangible thing, i. e., an alleged right of action which can now be sued on.

Before discussing further Petitioner's theory of "revival" or "bringing to life" of a more or less "dormant" substantive cause of action which it alleges came into being against Respondent, it is desired to develop more fully Respondent's argument that no such cause of action ever existed or could exist against Respondent in any real sense.

Respondent contends that the distinction between "substantive" and "procedural" law which is drawn by courts, most frequently in conflict of laws cases, does not apply to cases in which the United States has per-

mitted itself or its agency or instrumentality to be sued and that such distinction in no way supports Petitioner's position that a "substantive" cause of action arose against Respondent at the time of the injuries. When a court sitting in one state (the forum state) is called upon to determine a cause of action which arose under the laws of a foreign state, it is generally held under conflict of laws rules that those matters which relate to substance, sometimes called "matters of right," are governed by the law of the place where the transactions occurred out of which the claim in litigation arose, while those matters which relate to the procedure of the court, or "matters of remedy," are governed by the law of the forum state. Goodrich, *Conflict of Laws*, second edition, sec. 77, p. 187, et seq. Even in conflict of laws cases and in other cases where the concept is employed, however, courts recognize that the distinction between "substantive" and "procedural" law has validity only for certain limited purposes, and is often quite tenuous. Justice Holmes has said, "Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." Holmes, *The Common Law* (1881), p. 253. In *The Modern Law of Evidence* (1912), section 171, Chamberlayne repudiates the distinction in the following terms: "The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to us it, are, legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*; i. e., no law at all. While it may be convenient to distinguish between the right or liability, the remedy or penalty by which it is enforced, on the one hand, and the machinery by which the remedy

is applied to the right, on the other, i. e., between substantive law and procedural law, it should not be forgotten that, so far as either is law at all, it is the litigant's right to insist upon it, i. e., it is part of his right. In other words, it is substantive law." It is submitted that the holding in the *Commissioners* case, cited and discussed above, is in complete harmony with this view.

It is a well-established, elementary principle that any right to sue the United States or any of its agencies or instrumentalities is not a vested right protected by the Constitution, but merely a privilege which must first be granted in order to exist at all, and which, once created, may be withdrawn or modified whenever and to whatever extent the Congress in its discretion may determine. *Huff v. United States*, 22 F. Supp. 309; *Maricopa County et al v. Valley National Bank of Phoenix*, 318 U. S. 357, 363, 63 S. Ct. 587; *Hornbeck et al v. Bain Mfg. Co.*, 7 F. R. D. 605, 607; *Smith et al v. American Can Co.*, 8 F. R. D. 112; *Dismuke v. U. S.*, 297 U. S. 167, 56 S. Ct. 400. That Congress may endow a Government corporation with the Government's immunity is clear. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 59 S. Ct. 516 (1939).

It must therefore be apparent that there is no right of any kind, in any real sense, against the United States or any of its agencies or instrumentalities, until, and only to the extent that, the sovereign permits itself or such agency or instrumentality to be sued. To paraphrase the words of the Court in the *Commissioners* case, cited and quoted from above, the immunity of the United States from suit necessarily implies that no substantive cause of action can arise against it, and not that there is merely a procedural impediment to its enforcement.

While courts do employ the language "substantive"

and "procedural" because they find it convenient to do so for some limited purposes, it is submitted that the considerations pertinent in cases where the language is employed are not pertinent with respect to the Tort Claims Act or any other Act of Congress involved in this suit. Any right against the United States, or its agency or instrumentality, either "substantive" or "procedural," can arise only by virtue of an Act of Congress.

The Petitioner's theory, that there can be created a substantive right against the United States or one of its agencies before Congress passes an Act permitting itself or such agency to be sued in any given, defined circumstances, involves the assumption that the *laws of a state* can give rise to some sort of right against the United States in advance of Congress' declaration. But that is an impossible assumption, since it is accepted as incontrovertible that no state can by its laws (either statutory or common law) create any right, either "substantive" or "procedural" as against the United States or its agencies or instrumentalities. The very nature of our Federal structure of government precludes that possibility since the powers reserved to the several states by the Constitution of the United States do not include any power to create such rights, either "substantive" or "procedural," against the United States. No right against the sovereign existed at English common law, where the concept of sovereign immunity was expressed by the apt aphorism "The King can do no wrong." The United States, of course, is likewise clothed with sovereign immunity from suit. *Keifer* case (cited supra) at p. 388, and *Commissioners* case (cited supra) at p. 552, and cases cited. It follows, therefore, that any right which can be enforced by suit against the United States can only be derived from the express or implied consent of Congress. Until Congress

provides that for given acts or omissions the United States will henceforth be suable, under specified circumstances, there is no *right* against the Government. When such consent is granted, there arises at once a right which can be enforced in the manner and in such courts or administrative tribunals as the act prescribes. Such right, however, as aforesaid, is not a vested right but merely a privilege which can be withdrawn or modified at any time. The scope of the act of concession is as great and no greater than that defined in the act itself. Thus, for example, it has been held that the Federal Tort Claims Act authorizes suit against the United States only in so far as the Act expressly so provides, and that jurisdiction over such suits is limited to the terms of the consent given, which cannot be enlarged by judicial interpretation. *Brunell v. U. S.*, 77 F. Supp. 68; *Lazier v. U. S.*, 77 F. Supp. 241. The fact that it is the act of Congress which creates the right is not altered by the circumstances that such an act may, as does the Tort Claims Act, provide that the act shall extend in scope to acts or omissions which are torts under "the law of the place where the act or omission occurred." The basic fact remains that it is the United States Congress which *creates and defines the scope of such right*, notwithstanding that it may do so through the mechanism of adopting as its law, by reference, the "law of the place where the act or omission occurred." And it is no answer to this argument to say that a "substantive" right against the United States can arise under the law of a state before Congress' waiver of immunity from suit without violation of that Constitutional principle, since the "right" can not be enforced until Congress does waive immunity, for such an answer only points out the unreal, wholly illusory, nature of the alleged "substantive" right. To borrow again the language of Justice Holtzoff from the

Commissioners case, supra, "such a nebulous right would be but a phantom."

It is submitted that the principles of law discussed require the conclusion that no cause of action in tort can ever arise against an agency of the United States, such as Respondent, unless at the time of the events relied upon to form the basis of the alleged cause of action there was a subsisting right to sue such agency on such alleged cause of action. In the instant case, therefore, no cause of action can be said to have arisen against the Panama Canal Company on December 3, 1947, when the accident involved occurred, because at that time there was admittedly no subsisting right to sue the Company, as expressly held by the District Court in Civil No. 2807, the Tort Claims Act of August 2, 1946, having expressly withdrawn such right. The assertion that a "substantive" right arose in this case against Respondent and that such right was merely unenforceable because of a "procedural" immunity to suit, cannot, it is submitted, be maintained in the face of the aforesaid basic principle that so far as concerns the sovereign in tort cases, at least, there is no right in any real sense unless there is a remedy. In Respondent's view, therefore, from the time of the enactment of the Tort Claims Act in 1946 to the enactment of Public Law 172 in 1949, no right, either "substantive" or "procedural," arose or existed against the Panama Canal Company in any tort case covered by the exclusive provisions of the Tort Claims Act. Substance and procedure are necessarily merged in reference to any tort action against the sovereign.

In support of the view that application of the Tort Claims Act to the Panama Canal Company operates solely as a procedural bar to direct suits against that Company, Petitioner cites only *Wiltse vs. United States*, 74 Fed. Supp. 786, at 787, without analysis or discus-

sion [Petitioner's Brief p. 13]. The language of the *Wiltse* case presumably relied upon by Petitioner is certain general language to the effect that "the Federal Tort Claims Act does not create a cause of action, but waives *pro tanto* the sovereignty of the United States to permit suits of torts committed by agents and employees of the Government, * * * ." The question involved in *Wiltse* was whether a one-year Louisiana statute of limitations which the courts of that State had construed as peremption instead of prescription or limitations, or the period of limitations prescribed by the Federal Tort Claims Act, would govern. The Court held that the period prescribed by the Federal Tort Claims Act, which in that case happened to be longer, governed. It is submitted that the language of the Court presumably relied upon by Petitioner is at best only dictum, and that all that such language is really intended to say, when read in context, is that, of course, the Tort Claims Act does not expressly define the elements of tortious conduct which give rise to a tort cause of action, but rather does so simply by reference to the law of the particular state in which the alleged tortious conduct occurs. As developed hereinbefore, it is submitted that such circumstances, that is, that the elements of tortious conduct are defined by reference to state law, should not serve to obscure the essential fact that it is nonetheless the United States Congress which creates the substantive right by permitting the United States to be sued, and that *no right* of any kind can arise against the United States or its agency or instrumentality until Congress does waive sovereign immunity. It is submitted that the Court's conclusion and rationale in the *Commissioners* case, cited and analyzed above, in which the question of whether any "substantive" rights *could* antedate the coming into effect of the Tort Claims Act was directly involved in

and determinative of the case, are far more persuasive than the vague and generalized statement included in the *Wiltse* case.

If Respondent's view that no right can arise against an agency of the United States until the United States waives the immunity of such agency to suit is correct, and it is strongly urged on the basis of the above analysis that no other conclusion can be reached, the practical effects of the enactment of the Tort Claims Act, as related to this case, were as follows, from and after approval of the Act on August 2, 1946:

(1) No cause of action for injuries of the type incurred by Petitioner could arise against Respondent, Panama Canal Company, since that Act was expressly made exclusive within the field of its coverage and expressly *withdrew absolutely the right formerly extended to sue the Respondent* for such injuries (28 U. S. Code 2679), and created a new, and unrelated, right to sue the United States, as such entity, pursuant to the procedures prescribed by said Act. Under the principles of law discussed above, there can be no question but that the United States had complete authority to withdraw absolutely the right to sue the Respondent for such act or omissions of its officers and employees. It could, unquestionably, have withdrawn such right even without substituting the right made available under the Tort Claims Act;

(2) The injuries sustained by Respondent on *December 3, 1947*, therefore gave rise to a cause of action, if at all, only against the United States, as such entity, under the Tort Claims Act.

b. Prospective effect of Public Law 172, 81st Congress

The second part of Petitioner's argument is that the enactment of Public Law 172, 81st Congress, *approved*

July 16, 1949, ch. 340, 63 Stat. 444, which amended the Tort Claims Act so as to except from its purview" * * * Any claim arising from the activities of the Panama Railroad Company," operates so as to permit Petitioner now to bring suit against the Respondent (Panama Canal Company) to enforce the cause of action which it urges arose against Respondent at the time of the alleged injuries in 1947 notwithstanding the application of the Tort Claims Act. Petitioner does not urge that Public Law 172 of itself has any retroactive effect, and that question is therefore not discussed here at length. Suffice it to say that the general rule that statutes will be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed, is well settled. *Brewster vs. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457. See generally cases sited under section 263 of Title 59 (Statutes) of the Federal Digest at page 637 et seq. This Court has held that laws are not to be construed as applied to cases which arose before their passage, unless that intention be clearly declared. *Shwab vs. Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454. It has been held that retroactivity, even where permissible, is not favored except on the clearest mandate. *Claridge Apts. Co. vs. Commissioners of Internal Revenue*, 232 U. S. 141, 65 S. Ct. 172, 89 L. Ed. 139. There is an almost conclusive presumption against the power to take retroactive action under a statute unless Congress plainly specifies such power. *Trans. & Western Air vs. Civil Aeronautics Board*, 169 Fed. 2d 893, 83 U. S. Ap. D. C. 358 (C. A. D. C. 1948). A statute, to be construed as operating retrospectively, must not only clearly appear so to operate, but its retrospective character must be derived from the unequivocal import of the terms and manifest intention of the legislature. *U. S. vs. McKinney*, 107 Fed. 2d 879 (C.

C. A. Ohio 1939). This rule against the retroactive application of statutes applies fully as strongly to amendatory Acts as it does to statutes generally. *Dodge vs. Nevada National Bank of San Francisco*, 109 Fed. 726, 48 C. C. A. 626 (C. C. A. Cal. 1901), holding that an amendatory Act could not be given retroactive effect in the absence of language so declaring, even though it was the intention of the supporters of the bill that it should operate retroactively.

Petitioner contends only that the enactment of Public Law 172 now permits her to sue Respondent on the cause of action she urges arose against Respondent at the time of the alleged injuries. Respondent's reply to that, of course, is that no such cause of action did arise or could have arisen, for the reasons developed hereinbefore.

Petitioner makes considerable point of urging that the intent of Congress would be defeated by a holding that Public Law 172 applies prospectively only and does not serve to give Petitioner a cause of action against Respondent where none arose at the time of the injuries. The plain fact of the matter is that Congress, with respect to Petitioner's action then pending against the United States as such entity under the Tort Claims Act—as distinguished from its general intent to provide that, prospectively, the tortious acts or omissions of the Panama Canal Company or of its employees should give rise to a cause of action against the Company rather than against the United States under the Tort Claims Act—had no intent whatsoever, for the simple reason that the matter had not been brought to its attention. The legislative history cited by Petitioner discloses nothing more than the reasons for which it was desired to except the Panama Canal Company from the scope of the Tort Claims Act, *prospectively* (see United States Code Congressional Service, 1949,

Vol. 2, p. 1589, for House Committee Report No. 830). Those reasons were in no way concerned with any pending actions but were concerned only with the general unsuitability of the Tort Claims Act for the business-type operations of the Panama Canal Company, in view of the many practical considerations explained at length in the cited report. The legislative history evidences in no way any consideration of or intent concerning this Petitioner's situation, but merely confirms that Congress decided that it would be preferable to include the Panama Canal Company among the excepted agencies, for the reasons discussed in the report, and did so from and after July 16, 1949, by enactment of said Public Law 172. The legal result was that Petitioner's judicial remedy was cut off, no provision having been included in Public Law 172 to save such remedy. Had the matter of such pending actions been brought to Congress' attention it is practically a certainty that the legislation would have expressly covered such pending actions, and it must fairly be conceded that, in view of the legislative purpose of Public Law 172, Congress would have saved such pending causes of action, most probably, by providing that they could be litigated to conclusion under the Tort Claims Act. But the courts cannot legislate judicially even where Congress' failure to legislate was likely due to inadvertence.

Petitioner suggests that it would be an injustice to rule that the District Court lacked jurisdiction over the subject matter and that it certainly could not have been the intention of Congress to deny Petitioner the opportunity to have her claim tried on the merits. Although Respondent appreciates Petitioner's difficulties in getting her day in court on the merits of her case, it is submitted, as aforesaid, that what the intention of Congress might have been had it considered the

situation, and what if anything Congress might have done by way of inserting a savings clause in Public Law 172, are not germane to the legal issue now involved; namely, in view of what Congress actually did, does the District Court have jurisdiction over the subject matter of this suit (that is, does any right of action exist). The simple fact is that it is Congress' failure to have included a savings clause in favor of pending causes of action among the provisions of said Public Law 172 which puts Petitioner out of court, and only Congress can now provide that she shall have her day in court. If there is any injustice in Petitioner's inability to obtain a trial on the merits—and it is not entirely clear that there is in view of the settled doctrine that Congress can withdraw its "waiver of immunity" at will, that is, that there is no "vested right" in the continuance of such waiver—her appropriate remedy is by appeal to the Congress. It is respectfully submitted that it is not for the Courts to bend and twist the settled principles of law in order to fashion a conclusion in aid of a litigant whose proper remedy, if he has any, lies elsewhere.

In brief summary, Respondent's position with respect to the effect of the enactment of Public Law 172 on this suit is as follows:

(1) The right to sue the United States as such entity for injuries of the kind sustained by libelant was withdrawn absolutely. This served to withdraw such right to sue the United States even with respect to the pending cause of action, since there was no savings clause, as held by the Court below in Civil No. 2930 [R. p. 29].

(2) Public Law 172, *prospectively*, from and after its effective date, July 16, 1949, has the effect of authorizing persons to sue Respondent, Panama Canal Company, for injuries sustained after said effective date, in

accordance with the consent to be sued contained in its corporate charter. Since Public Law 172 was not by its terms retroactive, it authorizes suit against the Panama Canal Company only with respect to injuries which occur *after* the effective date of the Act.

Conclusion on First Issue

It is respectfully submitted that it follows from the principles of law discussed above and applied to the case before the Court that the District Court had no jurisdiction over the subject matter, that it was error for the District Court to rule that it had such jurisdiction, and that the dismissal of the case, ordered by said Court below on the grounds of laches and affirmed by the Court of Appeals, should be affirmed by this Court on the jurisdictional issue as well as on the laches issue.

Second Issue: Was the Court of Appeals clearly in error in ruling that the District Court did not abuse its discretion in dismissing the case on the ground of laches?

Summary: The question of whether a suit in admiralty is to be dismissed on the ground of laches rests in the sound discretion of the trial court; under the facts and circumstances of this case, the court properly dismissed the case on the ground of laches and was clearly guilty of no abuse of discretion in so doing, and the Court of Appeals properly affirmed such dismissal. More particularly, Respondent urges that in a libel in personam for the recovery of damages for personal injuries, the reasons for following the limitations of the common law in courts of admiralty are emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law as well as in admiralty, so that it

would be inconsistent to permit the libelant to sue in admiralty, with the same effect as at common law, after his right to sue at common law has become barred.

It is submitted that Petitioner's stated view of the holding of the Court of Appeals in the case at bar, to the extent that it suggests by implication that the Court held that the District Court was *bound* to dismiss the suit brought in admiralty because the libel was filed after expiration of the one-year period during which an action at law could have been brought for the same injuries, without regard to whether Petitioner (Libelant in the District Court) could show exceptional circumstances excusing its delay and rebutting the presumption of injury to Respondent resulting from such delay, is demonstrably erroneous.

The issue respecting laches which was before the Court of Appeals was the simple question of whether the District Court had *abused its discretion* in dismissing the libel on the ground of laches. This follows from two settled principles of law:

First, the well-established doctrine, not contested by Petitioner, that the question of laches is addressed to the sound discretion of the trial court and that such court's decision on that issue will not be disturbed on appeal unless so clearly wrong as to constitute abuse of discretion. *The Kermit. Lamborn et al vs. American Ship and Navigation Corp. et al*, 76 Fed. 2d 363 (C.C.A. 9th 1935). See also *The Kanto Maru. Inger A/S*, a *corp. vs. Harada Kisen Kabushiki Kaisha*, 112 Fed. 2d 564 (C. C. A. 9th 1940); *Carter Shipping Co. vs. Bowring, Jones & Tidy*, 281 U. S. 515, 50 S. Ct. 400, 74 L. Ed. 1008 (1930); *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 866, 29 L. Ed. 152 (1885); and

Second, the proposition that where an issue lies within the discretion of the trial court, it of course follows

that it is not for the appellate court to weigh the conflicting considerations which the trial court had for consideration, or to determine for itself how it would rule on such question, but only to determine whether the trial court's decision was so palpably erroneous that it amounted to an abuse of discretion. See *The Kanto Maru*, cited above.

Judicial action involving "discretion," which is the power exercised by courts to determine questions to which no strict rule of law is applicable but which from their nature and circumstances are controlled by the personal judgment of a court, is final and cannot be set aside on appeal except when there is a clear abuse of discretion. There is an abuse of discretion when the judicial action is arbitrary, fanciful, or clearly unreasonable, which means that if reasonable men could differ regarding the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Delno vs. Market St. Ry. Co. et al*, 124 Fed. 2d 965 (C. C. A. 9th Circuit 1942). Where an issue is within the discretion of the trial court, it of course follows that it is not for an appellate court to weigh the conflicting considerations which the trial court had for consideration, or to determine for itself how it would rule on such question, but only to determine whether the trial court's decision was so palpably erroneous that it amounts to an abuse of discretion. See *The Kanto Maru*, cited above. Respondent urges that the District Court quite correctly dismissed the case on the ground of laches, and that the Court of Appeals correctly affirmed, apart from the consideration that the trial Court's ruling was required to be sustained unless it amounted to a clear abuse of discretion, and that in any event, the trial Court's ruling most certainly did not constitute abuse of discretion.

The injuries alleged by Petitioner were alleged to have been sustained on December 3, 1947, and the libel in the case below was not filed until October 19, 1949, more than a year and ten months after the date of the alleged injuries. It is established that Limitations barring an action for personal injury run from the time of injury or breach of duty. *Goodall vs. Sartin*, C. C. A. Tenn., 141 Fed. 2d 427, cert. den. 65 S. Ct. 34; *Finck vs. Albers Super Markets*, C. C. A. Ky., 136 Fed. 2d 191; *Hilliard vs. Pennsylvania R. Co.*, C. C. A. Ohio, 73 Fed. 2d 473, cert. den. 294 U.S. 721, 55 S. Ct. 548, 79 L. Ed. 1253. It is clear, then, that any action at law based upon the injuries alleged to have been sustained in the present libel would be barred because of the provision of subsection 3 of section 87 of title 4, Canal Zone Code, prescribing a one-year period of limitation for injuries to one caused by the wrongful act or neglect of another, which reads as follows:

"87. *Within one year.*—Within one year:

* * * * * * * *"

> 3. An action for libel, slander, assault, battery, false imprisonment, seduction, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check.
>
> * * * * * * * *"

Petitioner's decision to sue in admiralty rather than at law, notwithstanding the right to jury trial would be lost thereby, can only have been taken in the hope of avoiding the bar of such limitation.

As aforesaid, Petitioner does not contest that the question of whether or not a libelant is guilty of laches lies within the sound discretion of the admiralty trial court. In the exercise of such discretion, however, the courts are guided by certain well-established principles. One of these is that, as a general rule, an admiralty

court will adopt by analogy the statute of limitations of the State in which the suit in admiralty is brought. *Hughes vs. Roosevelt*, 107 Fed. 2d 901, (C. C. A. 2d 1939); *Frame vs. City of New York*, 34 Fed. Supp. 194 (DC SD NY 1940); *Pope vs. McGrady Rodgers Co.*, 70 Fed. Supp. 780 (DC Penn. 1947), affirmed 164 Fed. 2d 591 (C. C. A. 3d 1947); *McGrath vs. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5th 1924); *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551 (C. C. A. 2d 1930); *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200 (C. C. A. 9th 1934); *Southard vs. Brady*, 36 Fed. 560 (CC NY); *Scull vs. Raymond*, 18 Fed. 547 (DC SD NY); *Davis vs. Smokeless Fuel Co.*, 182 Fed. 1004 (DC NY 1910) affirmed, *Davis vs. Smokeless Fuel Co.*, 196 Fed. 753 (C. C. A. 2d 1912).

Particularly strong reasons exist in a libel in personam for personal injuries, such as this is, for following the common law limitation. In such cases, barring highly exceptional circumstances, the common law limitation will be followed by courts sitting in admiralty because, since libelant has a right to sue at common law, as well as in admiralty, it would be inconsistent to permit him to sue in admiralty with the same effect as at common law, after his right to sue at common law is barred. *McGrath vs. Panama Railroad Co.*, 298 Fed. 303; *Pope vs. McGrady-Rodgers Co.*, 70 Fed. Supp. 780, affirmed 164 Fed. 2d 591; *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551; *Westfall Larson & Co. et al vs. Allman-Hubble Tug Boat Co. et al*, 73 Fed. 2d 200, 203. The same principle is applied in equity, where it is well established that where equitable and legal remedies are concurrent, a litigant may not enlarge the time within which to assert his remedy by electing to proceed in equity, since the limitation at law governs the court of equity. *Union Mut. Life Ins. Co. vs. Friedman*, 139 Fed. 2d 542, reversing 50

Fed. Supp. 278, citing cases for that proposition at page 545; *Goldboss vs. Reiman et al*, 55 Fed. Supp. 811, 819; *Bernstein vs. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maalschappy* (Chemical Bank & Trust Co., third party defendant), 76 Fed. Supp. 335, 346.

It is submitted as significant on the question of how far the analogy of the limitations at law should be followed in admiralty, that the Congress, in legislative enactments in maritime matters, and particularly in the personal tort field, has seen fit to establish fixed periods of limitation rather than relying upon the concept of laches. E. g.: Act of March 30, 1920, ch. 111, 41 Stat. 537 (46 U. S. C. 761 et seq.), providing a right of action for wrongful death on the high seas, which establishes a two-year period of limitations; Act of June 5, 1920, sec. 33, 41 Stat. 1007 (46 U. S. C. 688) (Jones Act).

It is submitted that the above cited *McGrath* case is persuasive in its reasoning, and that the District Court and the Court of Appeals were entirely correct in considering the case, decided by the Court of Appeals for the Fifth Circuit on appeal from the United States District Court for the District of the Canal Zone, as controlling on the question of laches. The facts in the *McGrath* case are in all pertinent respects analogous to those involved in the present case. In that case, the libelant, one Anna McGrath, sought to recover damages alleged by her to have been caused by injuries received by her while a passenger on one of this Respondent's steamships, while making a voyage between New York and the Canal Zone. The libel was dismissed by the then judge of said District Court expressly on the ground of laches, it having been filed 40 days after the expiration of a year from the date of the injury. On appeal to the Court of Appeals, the decision of the lower court was affirmed, the Court's

decision on that point reading as follows [298 Fed. 303]:

> "The applicable statute of limitations for actions at common law for personal injuries in the Canal Zone is one year from the date of the injury. The limitation of three years, which obtains under the Code of Colombia, was superseded by the repealing clause of the legislation and executive orders, which put into effect the Canal Zone Code of Civil Procedure. Courts of Admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. *In the case of a libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty, with the same effect as at common law (as is true in the case of a libel in personam), after his right to sue at common law had become barred.*" (Emphasis added.)

In a case such as the present one, injury to respondent is presumed from delay in commencing suit beyond the statutory period in common law actions, since when an admiralty court adopts the statutory period it also adopts the presumption of injury until the contrary is shown. *McGrath vs. Panama Railroad Co.*, 298 Fed. 303; *Pope vs. McGrady-Rodgers Co.*, 70 Fed. Supp. 780; *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, 73 Fed. 2d 200, 203; *Marshall vs. International Mercantile Marine Co.*, 39 Fed. 2d 551, 552; *California Casualty Indemnity Exchange et al vs. United States et al*, 74 Fed. Supp. 408, 410; *Redman vs. United States*, 176 Fed. 2d 713, 715; *Redman vs. United Fruit Co.*, 185 Fed. 2d 553 (C. A. 2d C. 1950). In the *McGrath* case the appellate court held on that point as follows:

> "The appellant suggests that no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury, until the contrary is shown. * * * ."

Redman vs. United Fruit Co., which appears to be the latest reported expression of the Court of Appeals for the Second Circuit on this point, holds in effect that before a court in admiralty may refuse to follow the local statute of limitations, libelant's evidence must clearly rebut the presumption of detriment to respondent which results from libelant's delay.

Petitioner appears to contend, in effect, that the District Court did not exercise its discretion on the question of laches, and that instead, it considered itself bound by the one-year statute of limitations per se. Such a contention strikes Respondent as novel indeed, since not even Respondent contended at any time, nor does it now contend, that the one-year statute of limitations applies per se. While the District Court's opinion of April 3, 1950 [R. p. 19] contains some apparently conflicting language, it cannot be assumed that the Court concluded that the one-year statute of limitations applied per se, since not even Respondent urged that it did, at any time. It is submitted that the basis of the Court's decision, and the conclusion that the Court did exercise its discretion, are clearly apparent from the Court's opinion where the Court [R. p. 22], after having stated its conclusions, states that:

> "The above reasoning is supported by the case of *McGrath vs. Panama Railroad Company*, an opinion of the Fifth Circuit Court of Appeals, * * * "

and then proceeds to quote at length from the decision in said *McGrath* case.

Also pertinent is the language of the Court's judgment of April 6, 1950 [R. p. 34] from which it clearly appears that the Court was sustaining *Respondent's* defense of laches on the *grounds urged by Respondent.* The Court of Appeals clearly regarded the District Court's decision as having been made "on the authority of *McGrath v. Panama Railroad Co.*, 298 Fed. 551 * * * " [R. p. 32].

The District Court and the Court of Appeals in the case at bar having adopted the *ratio decidendi* of the *McGrath* case, it must be considered that the decisions of the District Court and of the Court of Appeals were founded on and reached by the same analysis as governs the decision in *McGrath*; in other words, that, in the case at bar, the District Court, in the exercise of its admitted discretion, and after a full consideration of all evidence Libelant below was able to produce which would tend to indicate exceptional circumstances justifying the delay and rebutting the presumption of injury to Respondent from delay, concluded from all the facts and circumstances that there was not made out a case strong enough to excuse the delay or rebut the presumption of injury to Respondent resulting from delay, and accordingly dismissed the libel on the ground of laches, particularly since this case, like the *McGrath* case, was the case of a libel in personam for the recovery of damages for personal injuries, in which the reason for following the limitations of the common law in courts of admiralty is particularly strong by reason of the fact that there is preserved to the libelant in such a case, the right to sue at common law as well as in admiralty, so that it would be inconsistent to permit him to sue in admiralty, with the same effect as at common law, after his right to sue at common law had been barred. The Court of Appeals, following the rationale of its earlier decision in *McGrath*, merely held

that the District Court had not abused its discretion in dismissing the libel on the ground that it was barred by laches. In this decision, as in the *McGrath* case, the Court of Appeals did not hold that *no* type of special circumstance would justify a court in departing from the analogy of the statute of limitations at law, but only that, under the circumstances of this case, the District Court did not abuse its discretion in holding that no such departure was warranted.

It is submitted that the rationale of the *McGrath* case, which as aforesaid, must be deemed to form the basis for the decision of the Court below, is clearly sound and that the *McGrath* case is indistinguishable in any pertinent respect from the case at bar.

The cases cited by Petitioner on the issue of laches, in so far as they are pertinent to that issue as involved in this case, are distinguishable. The case *John M. Young, Appellant vs. The Steamboat Key City, et al* (U. S. 1872) 14 Wall. 653 [Petitioner's Brief, p. 7], is not pertinent to the issue before the Court, inasmuch as that case involved the question of a maritime lien arising out of injury to *property* and *was not a suit for personal injuries*, as is the present suit. As is developed hereinbefore, suits for personal injuries constitute a special class of admiralty suit, which calls for greater adherence by the courts to the statute of limitations, in the absence of highly exceptional circumstances, since it would be inconsistent to permit a libelant to sue in admiralty with the same effect as at common law after his right to sue at common law had been barred.

Petitioner relies upon *Lincoln vs. Cunard S. S. Co.*, 221 Fed. 622 (C. C. A. 2d 1915), which it represented by implication as being the law of the Court of Appeals for the Second Circuit, and with which the decisions in the instant case were stated to be in conflict, in its

petition for certiorari. In the *Lincoln* case Libelant, a seaman (bargemaster), brought suit for injuries sustained by him as a result of a discharge of steam from the side of a vessel. The libel was served four years, seven months and 15 days after the cause of action arose; the analogous statute of limitations at law was three years. Another statutory provision which the court found pertinent, sec. 405 of the Code Civ. Proc. N. Y., was quoted by the court as follows [221 Fed. at 624]:

> "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; that plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

The court in *Lincoln* stated the general rule respecting the analogy of common law limitations in determining the question of laches, and framed the issue involved in that case, in the following language [221 Fed. at 624]:

> "The rule in courts of admiralty is that, where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations. Southard v. Brady (C. C.) 36 Fed. 560; Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381. The libel having been filed more than a year and a half after the period fixed by the statute had expired, the question presented is whether the circumstances are *so exceptional* as to justify the court in holding that there was no such laches as to her relief. The respondent contends that there is nothing exceptional in the facts, and

that libelant's laches has been such as to put the case out of court." [Emphasis added]

The chronological development of that case was stated by the court to have been as follows [221 Fed. at 624]:

> "It appears that within two years after the accident an action at law was begun in the United States Circuit Court of the Southern District upon the assumption that Fill was a citizen of New Jersey and that a diversity of citizenship existed. It was supposed that Fill had become naturalized. This was found to have been error, and the common-law action was dismissed, without any investigation of the merits, on the ground that both plaintiff and defendant were citizens of Great Britain. The dismissal of the action was by the judgment of the Court expressly stated to be without prejudice to the plaintiff's right to proceed in admiralty. The action was submitted by stipulation of the facts on the question of jurisdiction and citizenship only, and was decided by the court without a jury on April 22, 1913. The libel was filed 14 days after the judgment of dismissal in the common-law case. *In substance this was merely a transfer of the controversy from the common-law to the admiralty side of the same court*; the Circuit Court having merged in the District Court January 1, 1912." [Emphasis added]

It is submitted that the court's characterization of that case as being "in substance * * * merely a transfer of the controversy from the common-law to the admiralty side of the same court" is significant, when contrasted with the circumstances of the case at bar, where the action at law brought by Petitioner immediately prior to the filing of the present libel against this Respondent was brought against a different defendant, the United States, under the Tort Claims Act.

On the factual circumstances quoted above, the court in the *Lincoln* case made the following conclusion of law [221 Fed. at 624, 625]:

> "Without going further into the matter, the *conclusion we have reached is that the circumstances may be regarded as exceptional*, and that libelant's conduct does not amount to laches, *especially in view of section 405, supra.*" [Emphasis added]

The court in *Lincoln* was doubtless also influenced by the further consideration that the libelant in that case was a seaman (bargemaster) and was therefore disposed to consider his case exceptional, under the well established rule, still in force and effect, that seamen, who historically were often ignorant of their rights, are the wards of admiralty. *Johnson vs. United States*, 186 Fed. 2d 120, 125 (C. A. 4th C. 1950). No such considerations apply in the case at bar.

Petitioner places considerable reliance upon *Holmberg vs. Armbrecht*, 327 U. S. 392, 66 S. Ct. 582 [Petitioner's Brief, p. 9]. Certiorari was granted in that case because it involved a question of enforcing liability under Federal equitable enactments. The Court of Appeals for the Second Circuit had held, relying on *Guarantee Trust Co. vs. York*, 326 U. S. 99, 65 S. Ct. 1464—which held that when a state statute bars recovery of a suit in a state court on a state-created right, it likewise bars recovery of such a suit on the equity side of a Federal court brought there only because it was between citizens of different states—that a New York statute of limitations was controlling and that the mere lapse of 10 years barred the action. This Court reversed on the ground that the *York* case did not control cases where Federal equitable enactments rather than state-created rights were involved. The case did not decide the question of whether Petitioner was guilty of laches, this Court expressly leaving that question for determination by the Court of Appeals on remand. The facts in *Holmberg* involved elements of fraud which gave rise to the Federal equitable doctrine which is read into every Federal statute of limitations, that time

would not begin to run even under a statute of limitations until such time as petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception which formed the basis for the suit. It is respectfully submitted that there is nothing in *Holmberg* which is inconsistent with the decisions rendered in the case at bar. The holding therein was limited to a decision that the *York* case was inapplicable to the enforcement of Federal equitable rights.

It is submitted that nothing in the holdings of the additional cases cited and relied upon by Petitioner is inconsistent with the holdings of the District Court and of the Court of Appeals in the case at bar.

Conclusion on Second Issue

Respondent respectfully submits that the District Court clearly did not abuse its discretion in dismissing the suit on the ground of laches and that the judgment of the Court of Appeals affirming such dismissal was not clearly erroneous and must therefore be affirmed.

WHEREFORE, on the conclusions reached on both issues involved, Respondent respectfully requests that the judgment of the Court of Appeals of December 14, 1950 [R. p. 33], be affirmed, and that the costs of this review be awarded against Petitioner.

Respectfully submitted,

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